



## **NATIONAL RETAIL FEDERATION COMMENTS ON MTC QUESTIONNAIRE ON MARKETPLACE LEGISLATION**

### **1. Definition of marketplace facilitator/provider**

State statutory definitions of “marketplace facilitator/provider” fall into two roughly equal categories: the “narrow” definition vs. the “broad” definition. Can more uniformity be achieved in this definition?

Should the definition of “marketplace facilitator/provider” contain exclusions for: advertising, payment processing, food delivery services, online travel companies, others?

**Concerns/suggestions:** \_\_\_\_\_

NRF supports state adoption of a “narrow” definition of “marketplace facilitator,” with as much uniformity as possible among the states, in order to ease the compliance burden for both marketplace facilitators and marketplace sellers. We are concerned that the “broad” definitions could inadvertently characterize certain businesses as “facilitators” because a seller contracts with them to perform, or assist with, some of the listed functions. It is also conceivable that some of the broad definitions could be interpreted to characterize more than one party as a facilitator on the same sale.

Specifically, NRF recommends that the definition of “marketplace facilitator” should exclude advertising, payment processing, and franchisors.

Advertising – The definition of marketplace facilitator should exclude advertising services. Retailers engage with various advertising service platforms, like shopping comparison platforms, where their products may be listed for sale and the advertiser may provide a link where the customer can click through to the retailer’s website to make the purchase. We are concerned that under some of the broad definitions these platforms could be considered a marketplace facilitator because they own and operate technology that brings the buyer and seller together, and they list the property for sale. We believe these types of platforms should be exempt from the definition of

marketplace facilitator in all states because the sale, payment and shipping are all handled by the seller/retailer. It would seem impossible for the platform to be given the responsibility for collecting tax if they are not collecting the payment and do not know where the item is being shipped.

- **Payment Processing** – The definition of marketplace facilitator should exclude payment processor businesses that are appointed by the merchant to handle payment transactions from various channels, such as credit cards, debit cards and stored value cards, and whose sole activity with respect to marketplace sales is to handle these transactions between two parties. This exclusion is similar to the exclusion included in several states’ statutes for payment processing, with the addition of stored value cards as an additional type of payment transaction that the payment processor might handle on behalf of the merchant. (A stored value card stores the monetary value on the card itself, not in an external account.)
- **Franchisors** – Many franchisors have mobile apps or websites whereby a customer will order food from the brand, and the order will be referred to the local franchisee who fulfills the order. In some cases, the payment for the food may be made on the website. In other cases, the customer may make payment when he picks up the food in the store or when it is delivered. The purpose of the marketplace laws is to make sure the state is able to collect sales taxes on remote sales made through a marketplace. Franchisees make their sales locally and collect the local sales tax. With the exception of delivery situations (discussed separately), customers pick up their orders at the franchisee’s location, and the tax is assessed on the sale based on the location. Although mobile apps may be used to expedite the purchase, the sale is still local. This is a different fact pattern from the third-party remote seller that sells on a marketplace. In addition, under terms of existing contracts between franchisors and franchisees, the franchisees collect and remit taxes for the sales in their stores.
- **Food Delivery Services** – Food delivery raises several complex issues. There are several variations of third-party food delivery service business models, ranging from some that have existed for decades to state of the art business models that are still being developed and continue to advance in complexity and technological sophistication. Across the spectrum, applicable taxes are already being collected and remitted industry wide. Each model and each individual delivery service provider and restaurant creates unique issues and

complexities, making a one size fits all approach impossible at this time. Factual and legal complexities include but are not limited to the existence of local meal taxes in some jurisdictions, limited customer data available to restaurants due to business practices and legal restrictions governing personally identifiable information, and associated sourcing issues. NRF has no objection to state marketplace facilitator laws that require third-party food delivery service providers to collect the applicable taxes due on food deliveries if they otherwise meet the definition of a marketplace facilitator, so long as they allow for existing tax compliance practices and unique factual and legal complexities specific to the restaurant industry to be taken into consideration. Specifically, state marketplace facilitator laws should be clear that, although food delivery companies have the responsibility to collect all taxes, restaurant and food delivery companies may contractually enter into an agreement whereby the restaurant agrees to remit the applicable taxes collected on sales made through the food delivery service.

## **2. Who is the retailer?**

Should marketplace facilitator/providers have the same rights as retailers under state law, such as claiming price adjustments, bad debt deductions, vendor compensation (if provided by the state), etc.?

**Concerns/suggestions:** \_\_\_\_\_

A marketplace facilitator should have the same rights as the retailer under state law since the facilitator has responsibility for collecting the tax.

## **3. Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection**

Enacted marketplace facilitator/provider collection laws generally provide that the marketplace facilitator/provider is the party to be audited, not the marketplace seller, on facilitated sales transactions. However, some of those laws also impose recordkeeping requirements on marketplace sellers for facilitated sales and subject the marketplace seller to audit under certain circumstances (such as when the marketplace facilitator/provider can establish that its failure to collect was due to erroneous information provided by the marketplace seller). Such laws may include liability protection for the marketplace facilitator/provider when the failure to collect is due to incorrect or insufficient information provided by the marketplace seller, in which case

the marketplace seller assumes the liability for failure to collect. Some of those laws only include such liability protection for “incorrect” information provided by the marketplace seller. Do clearer, simpler standards need to be put in place (such as defining the specific information the marketplace facilitator/provider can rely on for the marketplace seller to provide, and vice versa) in assigning liability for failure to collect between the marketplace facilitator/provider and the marketplace seller and in determining which party is subject to audit under what circumstances?

If liability protection for errors is provided to marketplace facilitator/providers, should it also be extended to marketplace sellers?

See NACSP suggestions under “Maintaining Records” and “Audit Issues.”

**Concerns/suggestions:** \_\_\_\_\_

Facilitators need to be protected from audit assessments caused by inaccurate information/mapping from the seller.

#### **4. Marketplace seller-marketplace facilitator/provider information requirements**

In situations when the marketplace seller retains responsibility for tax compliance, should the marketplace seller receive adequate information from the marketplace facilitator on marketplace transactions to allow for compliance with other tax laws? Should clear guidelines exist as to the information each party must provide to the other in order for the obligated party to correctly collect and report tax?

**Concerns/suggestions:** \_\_\_\_\_

We suggest that the facilitator be able to post the information on the Seller Portal.

#### **5. Collection responsibility determination**

Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax, etc.), be able to contractually agree which party has the sales/use tax collection obligation?

Marketplace facilitators and sellers should be able to contractually agree with respect to which party will bear the sales/use tax collection obligation, so long as the seller is registered to collect taxes in the state. The examples above dealing with shopping comparison platforms, franchisors and franchisees and

delivery services are all situations where it may be more appropriate for the seller to bear the responsibility than a marketplace facilitator, and so long as there is a contractual agreement between the parties, and the seller is registered to collect taxes and has a history of tax compliance in the state, the state should be protected, and the parties will know who is bearing the responsibility. This type of clause in marketplace statutes will help to assure that other fact patterns that may later arise that seem best handled by the seller can be addressed without requiring an amendment to the statute.

## **6. Marketplace seller economic nexus threshold calculation**

Should the marketplace seller, in determining whether it has exceeded the state's economic nexus threshold, be able to exclude its facilitated sales (which the marketplace facilitator/provider is responsible for collecting tax on) and only count its direct remote sales?

Small brick and mortar sellers must collect tax on their first dollar of sales. To provide the most level playing field for these small businesses, the threshold needs to be as low as possible, which would argue for including facilitated sales in determining the threshold. For this reason, the laws need to be as simple as possible.

## **7. Remote Seller sales/use tax economic nexus threshold issues**

Should the sales volume economic nexus threshold be limited only to taxable sales?

Should the "transactions" economic nexus threshold be eliminated?

The transactions economic nexus threshold should not be eliminated. Retailers that sell high priced items like jewelry, precious metals, collectibles, etc. may have very few transactions before they reach the dollar threshold for economic nexus, but they may still be a small business that would have trouble navigating their way through many state and local sales tax rules. This was clearly a concern of the Supreme Court in their decision in *Wayfair* and is an important factor to retain.

## **8. Certification requirement**

Should states develop a certification process for marketplace facilitator/providers?

How does the marketplace seller know if the marketplace facilitator/provider has collected? Should the marketplace facilitator/provider be required to provide a certification or report to the marketplace seller?

See NACSP suggestions under “Providing Software to Remote Sellers.”

**Concerns/suggestions:** \_\_\_\_\_

We agree with the need for facilitators to make information available to sellers that would be needed to support compliance and audit(see answer to 4, above); however we would disagree with the suggestion for a certification process.

### **10. Taxability determination**

Should states publish clear guidance identifying their sales/use tax impositions and exemptions, so remote sellers and marketplaces can more easily determine the taxability of their products?

See NACSP suggestions under “Determination of Taxability.”

**Concerns/suggestions:** \_\_\_\_\_

Yes, it is important that states publish clear guidance with respect to taxability. It is critical for both small and larger businesses that are confronted with new tax collection responsibilities that the rules be as simple and straightforward as possible.

### **11. Return simplification**

Can the sales reporting on returns and recordkeeping requirements, as between the marketplace facilitator/provider and marketplace seller, be simplified and clarified? How does the marketplace seller properly report facilitated sales: taken as a deduction, claimed as an exemption, or not reported at all on return? Can the marketplace facilitator/provider return be simplified and consolidated?

See NACSP suggestions under “Return Filings” and “Remittances.”

**Concerns/suggestions:** \_\_\_\_\_

For marketplace facilitators that also have direct sales, we recommend that the facilitated sales be reported on a separate return.

### **12. Foreign sellers**

Should states publish clear guidance for foreign sellers with economic nexus needing to register to collect? Should states develop enforcement strategies concerning noncompliant foreign sellers?

**Concerns/suggestions:** \_\_\_\_\_

Yes. Again, the only way to assure that there is a level playing field with respect to collection of taxes on sales is to assure that tax collection is enforced on all sales to customers in states that impose sales and use taxes. This requires both clear guidance for foreign sellers, as well as enforcement strategies for noncompliant foreign sellers.

### **13. Local sales/use taxes**

For “home rule” states that have locally administered local sales/use taxes, what is the best approach to address Due Process/Commerce Clause concerns: (a) use of a “blended” state and local rate that remote sellers can use (such as the Alabama Simplified Sellers Use Tax System); or (b) destination sourcing of both interstate and intrastate sales? For (a), how should “remote seller” entitled to use the blended rate be defined, and do in-state sellers have any discrimination claim? Should the economic nexus threshold apply at the local jurisdiction level?

See NACSP suggestions under “Tax Rates” and “Local Jurisdiction Boundary Tables.”

**Concerns/suggestions:** \_\_\_\_\_

We believe that in-state sellers should be able to opt-in if a home rule state creates a “blended” state rate so that they, too, can take advantage of the simplified compliance.